IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 744

SEABOARD AIR LINE RAILWAY COMPANY,
Appellant.

vs.

A. D. WATTS, COMMISSIONER OF REVENUE OF NORTH CAROLINA; BENJAMIN R. LACY, STATE TREASURER OF NORTH CAROLINA; BAXTER DURHAM, STATE AUDITOR OF NORTH CAROLINA, AND JAMES S. MANNING, ATTORNEY GENERAL OF NORTH CAROLINA,
Appellees.

BRIEF ON BEHALF OF APPELLANT

MURRAY ALLEN,
Counsel for Plaintiff.

FORNEY JOHNSTON,
JAMES F. WRIGHT,
Of Counsel.

INDEX

PROVISIONS OF CONSTITUTION AND STATUTES QUOTED:

AUTHORITIES CITED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 744

SEABOARD AIR LINE RAILWAY COMPANY,

Appellant.

Against

A. D. WATTS, Commissioner of Revenue of North Carolina; BENJAMIN R. LACY, State Treasurer of North Carolina; BAXTER DURHAM, State Auditor of North Carolina, and JAMES S. MANNING, Attorney General of North Carolina,

Appellees.

BRIEF ON BEHALF OF APPELLANT.

ASSIGNMENTS OF ERROR.

The assignments of error will be found in full in this brief as Appendix A. Succinctly stated, these assignments of error and the questions presented by this appeal are as follows:

1. The Constitution of North Carolina authorizes the Legislature to tax only net incomes, and the Income Tax Act violates the Constitution in levying a tax upon plaintiff's operating revenue.

2. The Income Tax levied on carriers engaged in interstate commerce by Section 202 of the Income Tax Act of 1921 is a burden on interstate commerce and violates the Commerce Clause of the Constitution of the United States.

3. The Income Tax Act of 1921 creates an unlawful discrimination against plaintiff in the attempted classification of railroads and other public service corporations in violation

of the Constitution of North Carolina and the Constitution of the United States.

4. The scheme of taxation by which the State government is supported by taxes other than *ad valorem* tax on property violates the Constitution of North Carolina.

5. The Court erred in denying the injunction and dismissing the bill.

STATEMENT OF THE CASE.

This action is brought to enjoin the collection of a tax levied on plaintiff by the Income Tax Act, enacted by the Legislature of North Carolina at the Session of 1921, upon the grounds, as more fully set out herein, that such act violates the Constitution of North Carolina and the Constitution of the United States.

The provisions of the Constitution of North Carolina, Article 5, Section 3, authorizing the levy of an income tax are as follows:

> "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stock, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money: *Provided*, notes, mortgages, and all other evidence of indebtedness given in good faith for the purchase price of a home, when said purchase price does not exceed three thousand dollars, and said notes, mortgages, and other evidence of indebtedness shall be made to run for not less than five nor more than twenty years, shall be exempt from taxation of every kind: *Provided*, that the interest carried by such notes and mortgages shall not exceed five and one-half per cent. The General Assembly may also tax trades, professions, franchises, and incomes: '*Provided*, the rate of tax on incomes shall not in any way exceed six per cent (6%), and there shall be allowed the following exemptions, to be deducted from the amount of annual incomes,

to-wit: for a married man with a wife living with him, or to a widow or widower having a minor child or children, natural or adopted, not less than $2,000; to all other persons less than $1,000, and there may be allowed other deductions (not including living expenses) so that only net incomes are taxed."

The Legislature of North Carolina, at its regular session of 1921, purporting to act under the authority of the provisions of the constitution above quoted, enacted a law providing for the levying, collecting and paying of an income tax on individuals and corporations, the said law forming a part of the Revenue Act of 1921, being Chapter 34 of the Public Laws of North Carolina of 1921. It is provided by Section 100 of the Revenue Act that the income tax schedule should be known and cited as the Income Tax Act of 1921, and the said act will be so referred to in this brief.

Section 101 of this act as amended by the General Assembly of North Carolina, Special Session of 1921, is as follows:

"Sec. 101. Purpose. The general purpose of this act is to impose a tax, for the use of the State Government, upon the net income for the calendar year 1921, in excess of exemptions herein set out, collectible in the year 1922, and annually thereafter:

(a) Of every citizen of the State.

(b) Of every domestic corporation.

(c) Of every foreign corporation and of every nonresident individual having a business or agency in this State, in proportion to the net income of such business or agency.

Except as otherwise provided in this act the purpose is to conform to the definitions of income in the revenue laws of the United States Government and regulations made under its authority, in so far as they apply.

The tax imposed upon the net income of corporations in this schedule is in addition to the tax imposed under Schedule C of this Act."

Section 201, as amended by the General Assembly of North Carolina, Special Session of 1921, provides:

"Sec. 201. Corporations. Every corporation organized under the laws of this State shall pay annually an income tax equivalent to three per cent of the entire net income of such corporation, as herein defined, received by such corporation durin gthe coming year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to three percent of a proportion of its entire net income, to be determined according to the following rules:

In case of a company other than companies mentioned in the next succeeding section, deriving profits principally from the ownership, sale, or rental of real estate or from the manufacture, sale, or use of tangible personal property, such proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of incumbrances thereon.

In case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this State for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the State."

Section 202 of the Income Tax Act of 1921, under which the income tax is levied on plaintiff is as follows:

"Sec. 202. Railroads and public service corporations. The basis of ascertaining the net income of every corporation engaged in the business of operating a steam or electric railroad, express service, telephone or telegraph business, or other form of public service, when such company

is required to keep records according to the standard classification of accounting of the Interstate Commerce Commission, shall be the 'net operating income' of such corporations as shown by their records kept in accordance with that standard classification of accounts, when their business is wholly within this State, and when their business is in part within and in part without the State their net income within this State shall be ascertained by taking their gross 'operating revenues' within this State, including in their gross 'operating revenues' within this State the equal mileage proportion within this State of their interstate business and deducting from their gross 'operating revenues' the proportionate average of 'operating expenses' or 'operating ratio,' for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts. From the net operating income thus ascertained shall be deducted 'uncollectible revenues', and taxes paid in this State for the income year, other than income taxes and war profits and excess profits taxes, and the balance shall be deemed to be their net income taxable under this Act."

In addition to the deductions allowed the corporations referred to in Section 202, railroads are permitted to deduct certain items of car hire as provided by Chapter 35, Public Laws of 1921.

The deductions allowed corporations other than those referred to in Section 202 are shown on the Corporation Income Tax Return issued by the State Department of Revenue, (Printed Record, page 28,) and based upon Section 306 of the Income Tax Act, as follows:

1. All the ordinary and necessary expenses paid during the income year in carrying on any trade or business.

2. Reasonable compensation of officers.

3. Rentals or other payments required to be made as a condition of the continued use or possession, for the pur-

pose of the trade of property to which the taxpayer has not taken, or is not taking title, or in which he has no equity.

4. All interest paid during the income year on indebtedness, except interest on obligations contracted for the purchase of nontaxable securities. Dividends on preferred stock shall not be deducted as interest.

5. Taxes for the income year, except taxes on income and war profits and excess profits taxes, inheritance taxes, and taxes assessed for local benefit of a kind tending to increase the value of the property assessed.

6. Dividends from stock in any corporation the income from which shall have been assessed and the tax on such income paid by the corporation under the provisions of this act: *Provided*, that when only part of the income of any corporation shall have been assessed under this act only a corresuonding part of the dividends received therefrom shall be deducted.

7. Losses sustained during the income year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit.

8. Debts ascertained to be worthless and charged off within the taxable year if the amount has previously been included in gross income in a return under this act.

9. A reasonable allowance for depreciation and obsolencence (if any) and depletion (if any).

10. Reserve for bad debts, in case of taxpayers who keep regular books of account.

11. Deduct from net taxable income contributions or gifts mode within the taxable year to corporations or associations, enumerated in Section 306, Article 3, not exceeding 15 per cent of net income.

The deductions allowed individuals are set out in Section 306 of the Income Tax Act, and are practically the same deductions allowed corporations.

It appears from the affidavit of H. W. MacKenzie, General Auditor of Seaboard Air Line Railway Company (Printed Record, page 34), and Exhibits A and B, (Printed Record, pages 35 and 37), that the plaintiff will be required under the North Carolina Income Tax Act, if valid, to pay an income tax for the year 1921 of $13,133.09, whereas the statement of net income for the year 1921, according to the classification of accounts prescribed by the Interstate Commerce Commission shows that plaintiff sustained a net loss in 1921 in the State on North Carolina of $254,290.22.

ARGUMENT.

I

THE CONSTITUTION OF NORTH CAROLINA AUTHORIZES THE LEGISLATURE TO TAX ONLY NET INCOMES, AND THE INCOME TAX ACT VIOLATES THE CONSTITUTION IN LEVYING A TAX UPON PLAINTIFF'S OPERATING REVENUE.

Article 5, Section 3, of the Constitution of North Carolina, as amended, provides that the general assembly may tax incomes and after providing for certain exemptions to individuals, it concludes with this language: *"So that only net incomes are taxed."*

We submit that this section of the Constitution restricts the authority of the general assembly to the taxation of *net incomes.* In the absence of the concluding words, this section, under the usual rules for the construction of statutes and constitutions would be limited to net incomes, because the definite and well understood and the ordinary and every-day meaning of the word "income" is the profit or gain derived from capital or from labor or from both, and it is so defined in *Stratton's Independence v. Howbert,* 231 U. S., 399, and in *Eisner v. Macomber,* 252 U. S., 189.

In 26 Ruling Case Law, 140, the writer of the article on Taxation says:

"The word income appears to have been used in the reported cases as meaning gross receipts, net earnings, gains or profits, depending on the context. In constitutional and statutory provisions in regard to taxation, however, income appears to be uniformly construed as meaning net income, as opposed to gross receipts, which are also in some cases a measure of taxation. Income means the balance of gain over loss and where there is no such balance of gain there is no income which is capable of being assessed. *The gross returns which an owner receives from his property do not denote his income, which means what he has for himself, what he can spend after satisfying all just outgoings in respect to the property which yields the return.*" (Italics added).

The General Assembly of 1921 recognized the constitutional limitation of its authority and in Section 101 of the Income Tax Act declared the general purpose of the act to be to impose a tax upon the *net income*. But while the limitation was recognized in this section, it was disregarded when Section 202 was so drawn as to tax the net operating revenue of the corporations referred to therein, and not the net income, the purpose being to fix the taxable income of such corporations at a figure which would of necessity exceed their net income.

The Interstate Commerce Commission in a system of uniform accounting adopted under the authority of the Interstate Commerce Act permits the following deductions in arriving at the true net income of railroads in addition to the deductions set forth in Section 202:

Joint Facility Rents;
Rent for Leased Roads;
Miscellaneous Tax Accruals;
Separately Operated Properties—Loss;
Interest on Funded Debt;
Interest on Unfunded Debt;
Amortization of Discount on Funded Debts;
Maintenance of Investment Organization;

Income Transferred to other Companies; Miscellaneous Income Charges.

Manifestly these deductions must be permitted before it can be determined what amount the railroad has for itself and what it can spend after satisfying all just outgoings in respect of the property which yields the revenue. Revenue cannot be translated into income in the sense the word is used in the Constitution of North Carolina and as it is defined by the Supreme Court of the United States in *Stratton's Independence v. Howbert*, 231 U. S., 399, until the items of expense and loss in producing the revenue have been deducted. The numerous deductions found by the Interstate Commerce Commission to be necessary before net income can be determined, which are not permitted by the Income Tax Act of North Carolina, demonstrate, we submit, that this act necessarily results in levying the income tax of plaintiff on a sum which is much larger that its net income.

II

THE INCOME TAX LEVIED ON CARRIERS ENGAGED IN INTERSTATE COMMERCE BY SECTION 202 OF THE INCOME TAX ACT OF 1921 IS A BURDEN ON INTERSTATE COMMERCE AND VIOLATES THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The tax imposed by the Income Tax Act of 1921 is a burden on interstate commerce in that it is levied upon the operating revenue of a carrier engaged in interstate commerce and expressly requires that the revenue derived from that part of the carrier's business, which is within the state, shall be included in the sum taxed as "net income." The act does not tax the "net income" derived by a railroad company from its intrastate and interstate business, but it taxes such part of the operating revenue derived from its interstate business as is represented by the proportion of the mileage in North Carolina to the total mileage of the system. This inevitably taxes revenue

from interstate commerce as distinguished from "net income," and the amount of the tax to be paid "necessarily varies in proportion to the volume of that commerce, and hence amounts to a direct burden on it."

Crew Levick Co. v. Pennsylvania, 245 U. S., 292.

"It is well settled that a state cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce *or the receipts derived from that transportation*, or on the occupation or business of carrying on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs to congress. (Italics added).

Lyng v. Michigan, 135 U. S., 161;
LeLoup v. Port of Mobile, 127 U. S., 640;
Telegraph Co. v. State Board, 132 U. S., 472;
McCall v. California, 136 U. S., 104;
Railroad Co. v. Pennsylvania 136 U. S., 114.

In 12 Corpus Juris, page 96, note 98, will be found an exhaustive list of the decisions of the United States Supreme Court and the state courts in support of this proposition. See also *Bain v. Railroad*, 105 N. C., 363, in which Chief Justice Merrimon discusses the reason for the rule.

In *Kansas City F. S. & R. M. Co. v. Botkin*, 240 U. S., 227, it is said:

"It must be assumed, in accordance with repeated decisions, that the state cannot lay a tax on interstate commerce 'in any form,' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it. And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced,—and cannot depend upon the

manner in which the taxing scheme has been characterized."

The concluding paragraph of the opinion of Mr. Justice Pitney in *United States Glue Company v. Town of Oak Creek*, 247 U. S., 321, in which the levy and assessment of a general income tax upon the net income of a corporation derived from transactions in interstate commerce is upheld, contains a statement of the essential elements of a valid income tax on interstate commerce:

"And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon the plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. *It was measured not by gross receipts, but by the net proceeds from this part of plaintiff's business*, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business." (Italics added)

In the same case it is said:

"It is settled that a state may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule."

And after referring to the cases of *Crew Levick Co. v. Pennsylvania*, 245 U. S., 292 and *Peck & Co. v. Lowe, Collector*, 247 U. S., 165, as illustrating the correct line of distinction between an income tax which directly burdens interstate commerce and one which does not, Mr. Justice Pitney says:

"This distinction between a direct and an indirect bur-

den by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and effecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden."

In *Crew Levick Co. v. Pennsylvania*, 245 U. S., 292, the court in another opinion by Mr. Justice Pitney, holds that an income tax on wholesale and retail dealers in merchandise, the amount of which is based upon the volume of business transacted, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, on orders taken there or sent direct to the dealer, constitutes a direct burden on foreign commerce. In the opinion it is said:

"In *Postal Telegraph Cable Co. v. Adams*, 155 U. S., 688, the court, again speaking by Mr. Chief Justice Fuller, said 'It is settled that where , by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce tnd cannot be sustained.' *The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax, except as it is imposed on the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions.* That it applies to internal as well as foreign commerce cannot save it; for, as was said in case of the State Freight Tax, 15 Wall. 232: 'The state may tax its internal commerce, but if an act

to tax interstate or foreign commerce is unconstitutional it is not cured by including in its provisions subjects within the domain of the state.' That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it. So obvious is the distinction between this tax and those that were sustained in *Maine v. Grand Trunk Ry. Co.*, 142 U. S., 217; *U. S. Express Co. v. Minnesota*, 223 U. S., 335; *Baltic Mining Co. v. Massachusetts*, 231 U. S., 68; *Kansas City Ry. v. Kansas*, 240 U. S., 227, and some other cases of the same class, that no time need be spent upon it." (Italics added)

In *Peck & Co. v. Lowe*, 247 U. S., 165, the Act of Congress of October 3d, 1913, c. 16, sec. 2, 38 Stat. 166, levying an annual tax on a domestic corporation of a specified per centum of its "entire net income arising or accruing from all sources during the preceding calendar year," is held not to be subject to the objection that it is unconstitutional as a tax or duty which directly burdens exportation. In the opinion in this case Mr. Justice Van Devanter says:

"It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after recipient of the income is free to use it as he chooses."

In 26 Ruling Case Law, page 144, it is said:

"It has been authoritatively held that a state may tax the entire *net income* of a corporation although part of such income is derived from interstate commerce, since such a tax is not in the nature of a burden laid on the busi-

ness, the gross receipts or the property employed in interstate commerce, but deals only with that part of the fruits of such commerce which remains as the net proceeds after all the immediate burdens of the commerce have been discharged," citing *U. S. Glue Co. v. Oak Creek*, 161 Wis. 311; s. c. 247 U. S., 231.

See also, 12 Corpus Juris, page 112 and cases cited in note 51

While the Supreme Court held in *Underwood Typewriter Company v. Chamberlain*, 41 S. C. Rep., 45 that a tax "measured by *net profits* is valid, although these profits may have been derived in part, or indeed mainly from interstate commerce," such decision does not in any way affect the prior decisions of the court declaring invalid taxes upon the *gross receipts* from interstate commerce, nor is such decision authority against the position of plaintiff.

The use of the words "an income tax *equivalent* to three per cent of the entire net income" is not sufficient to save this statute from the objection that it is a direct tax upon interstate commerce.

In *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S., 217, in which a tax on gross receipts of an interstate railroad is held to be unconstitutional, the United States Supreme Court says:

"We are of the opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal to' 1 per cent of gross receipts, and a tax of 1 per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. There is merely an

> effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to'. "Of course it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state. We are of the opinion that the judgments should be reversed."

In the original enactment of the statute imposing on corporations the tax of three per cent of their net incomes, such tax was called "a franchise or excise tax with respect to carrying on or doing business." (Revenue Act of 1921, Section 201) By an act passed by the Special Session of 1921, this language was stricken from the act. It was evidently used in the original act in an effort to bring the tax with in the decision in *Spreckel Sugar Refining Co. v. McClain*, 192 U. S., 397, and upon second thougt it was found that a franchise or privilege tax of one-tenth of one per cent of the assessed value of the property of corporations had already been levied and a second tax of the same nature would be clearly invalid.

In another way this income tax is a burden on interstate commerce. The State of North Carolina, by its tax laws, permits the counties, cities, towns, townships and special taxing districts to levy taxes on the assessed value of plaintiff's property known as an ad valorem tax, which is based upon the whole property of complaint, tangible and intangible, and to this tax laws of the state add to a so-called franchise tax of one-tenth of one per cent on the same assessed value, and by the income tax law, the Legislature of North Carolina has levied an additional tax characterized as an income tax of three per-cent on complainant's net operating revenue, including revenue derived from interstate commerce. We submit that this system of pyramiding taxes and the entire scheme of taxation amounts to a regulation of commerce between the states, because necessarily a tax of one-tenth of one percent upon the tangible and intangible property of this complainant and a tax of three per-

cent upon its net operating revenue, including revenue derived from interstate commerce, are taxes upon interstate commerce, the property, tangible and intangible, having already been taxed at its full value and this scheme of taxation levies a tax which is a burden upon the interstate commerce of plaintiff and violates the commerce clause of the Constitution of the United States, Section 8 of Article 1.

III

THE INCOME TAX ACT OF 1921 CREATES AN UNLAWFUL DISCRIMINATION AGAINST COMPLAINANT IN THE ATTEMPTED CLASSIFICATION OF RAILROADS AND OTHER PUBLIC SERVICE CORPORATIONS IN VIOLATION OF THE CONSTITUTION OF NORTH CAROLINA AND THE CONSTITUTION OF THE UNITED STATES.

The Income Tax Act of 1921 (Public Laws of 1921, ch. 34) in section 201 to 204, inclusive, and sections 300 to 306, inclusive, classifies corporations for the imposition of the income tax as follows:

(1) Corporations engaged in the business of operating a steam or electric railroad, express service, telephone or telegraph business or other form of public service *when such companies are required to keep records according to the standard classification of accounting of the Interstate Commerce Commission and whose business is in part within and part without the state,* are required to pay a tax equal to 3% of their gross operating revenues within the state, including therein the equal mileage proportion within this state of their interstate business and deducting therefrom the proportionate average of the operating expenses or operating ratio of their whole business as shown by the Interstate Commerce Commission standard classification of accounts, and from the amount thus ascertain is deducted uncollectible revenue and taxes paid in the state other than income taxes and war profits and excess profits taxes and there is also deducted any debit balance paid on account of car hire.

(2) Corporations engaged in the business of operating a steam or electric railroad, express service, telephone or telegraph business, or other form of public service *when such companies are required to keep records according to the standard classification of accounting of the Interstate Commerce Commission and whose business is wholly within the state* are required to pay a tax equal to 3% of their "net operating income" as shown by their records kept in accordance with the standard classification of accounts with the deductions above set forth.

(3) Corporations engaged in the business of operating a steam or electric railroad, express service, telephone or telegraph business, or other form of public service, *when such companies are not required to keep records according to the standard classification of accounting of the Interstate Commerce Commission* are required to pay a tax of 3% on net income similar to that imposed upon all other corporations by section 201 of the Income Tax Act and such corporations are allowed the deductions from their gross income set out in section 306 of the said act, which deductions are not allowed corporations referred to in (1) and (2) above.

(4) Corporations which own a steam or electric railroad, express service, telephone or telegraph business, or other form of public service and which are *not engaged in the operation* thereof, but have an income from other sources, such as leases, rentals, etc., are allowed the same deductions as other corporations and pay the tax only on net income.

(5) Every corporation organized under the laws of North Carolina and every foreign corporation doing business in the state, except the corporations referred to in paragraphs (1) and (2) are required to pay a tax equivalent to 3% of their *net income* and in arriving at net income such corporations are allowed the deductions set out in section 306 of the Income Tax Act.

The provisions of section 202 are restricted to corporations engaged in interstate commerce because by the terms of the

interstate commerce act only such corporations are required to keep their accounts according to the standard classification of accounting of the Interstate Commerce Commission. (Act to Regulate Commerce, Feb. 4th, 1887, c. 104, sec. 20, 24 Stat, 386 as amended; Barnes' Federal Code, 1921 Supplement, Sec. 7916.)

In the case of a corporation owning a railroad, which it does not operate, but leases to another railroad, and has an income from that and other sources, it is well settled that such corporation is not liable for an income tax imposed upon corporations "engaged in business."

McCoach v. Minehill & S. H. R. Co., 228 U. S., 295.

We submit that the classification of corporations for income taxation made by the Income Tax Act of 1921 is quite as unreasonable, arbitrary and illusory as that appearing in the Virginia law held to be unconstitutional by the United States Supreme Court in *Royster Guano Co. v. Virginia*, 253 U. S., 412; 40 S. C. Rep. 560, in which it is held:

(1) Acts of Virginia, 1916, c. 472, in so far as it imposes on a domestic corporation doing business both within and without the state a tax with respect to its income derived from sources outside the state, denies such corporation the equal protection of the laws, in violation of the Fourteenth Amendment, in view of Acts of Virginia, 1916, c. 495, exempting domestic corporations doing no part of their business within the state from any tax on their income; the classification being arbitrary.

(2) The equal protection of the laws required by the Fourteenth Amendemnt does not prevent the states from resorting to classification for the purposes of legislation.

(3) Under the Fourteenth Amendment, classification for purposes of legislation must be reasonable, and not arbitrary, and must rest upon some ground of difference having a fair and sub-

stantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

(4) While the latitude of discretion is wide in its classification of property for purposes of taxation, a discriminatory tax cannot be sustained against the complaint of a party aggrieved, if the classification is altogether illusory.

In discussing the subjects of classification of corporations for taxation, the Supreme Court of the United States has said:

> "It remains to consider the argument made on behalf of the state of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; the classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf C. & F. R. Co. v. Ellis,* 165 U. S., 140; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godart*), 183 U. S., 79; *Conolly v. Union Sewer Pipe Co.,* 184 U. S., 540.
>
> "It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama, carrying on the railroad business

in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars.

"We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state does violence to the Federal Constitution."

Southern Ry. Co. v. Greene, 216 U. S., 400.

In *G. C. & S. F. R. Co. v. Ellis*, 165 U. S., 150, a leading case on the subject of discrimination by arbitrary selection under the guise of classification, the United States Supreme Court says:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is based upon some reasonable ground, some difference which bears a proper relation to the attempted classification, and is not a mere arbitrary selection."

Bell's Gap R. Co. v. Pennsylvania, 134 U. S., 232;
Magoun v. Bank, 170 U. S., 283;

Keeny v. New York, 222 U. S., 525.

"Arbitrary section cannot be justified by calling it classification."

Southern Ry. Co. v. Greene, 216 U. S., 400.

In *State v. Williams*, 158 N. C., 610, this subject is discussed at some length by Mr. Justice Walker, and it is held that a town ordinance which required every person, firm or corporation in the state, soliciting or taking orders for goods to be delivered in the town by nonresident merchants, firms or corporations is discriminative and unconstitutional. In this case it is held:

(1) While the taxing of trades is not expressly included in the rule of uniformity declared by the Constitution of North Carolina, Article 5, Section 3, the courts, by interpretation, will subject it to the same rule because a different rule would be inconsistent with natural justice and with the intend as gathered from the section referred to.

(2) In laying a tax, the differet subjects thereof may be reasonably, though not arbitrarily, classified, and a different rule of taxation prescribed for each class, provided the rule is uniform in its application to the class for which it is made. The result must be to prevent discrimination among individuals or subjects of any one class, based upon special privileges, immunities or exemptions allowed to one and not to others.

"Uniformity, in its legal and proper sense, is inseparably incidene to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, etc."

State v. Moore, 113 N. C., 698.

In the case of *Worth v. Railroad*, 89 N. C., 291, the tax law under consideration provided for the taxation of three classes of railroads, and the taxes imposed upon one were not imposed

upon the other two. The three classes of railroads are described in the opinion at page 294, as follows:

"1. If the road is, by virtue of the contract contained in its charter, exempt from taxation upon its property or shares, a tax is levied upon the incorporation equal in amount to one per centum upon its gross receipts.

2. If it be exempt from liability to taxation upon its real estate held 'for right of way, for station places and workshop locations,' following the language of the exemption contained in the charter of the North Carolina railroad company, as amended in the act of February 14th, 1855, but is liable to a tax upon its franchise and personal estate, it is subject to a tax of one per centum upon the gross receipts.

3. If the property of the road be exempt, and it be not liable to the preceding tax, it was before subjected to a tax of one per cent upon the cash value of the shares, and by the act of 1881 instead, to what is termed a privilege tax of twenty-five dollars per annum for each mile of its track through its entire extent."

In holding that this method of the taxation of railroads violates the Constitution of North Carolina, Chief Justice Smith says:

"The first enumerated tax is not general in its application to railroads and canals, but is special and confined to such only as fall within the descriptive words of the statute, and the same is strictly true as to others. The obvious result of this legislation is to impose burdens on exempted roads, which are not imposed upon those unexempted, and pro tanto to counteract the effect of the discriminating privileges and immunities that would otherwise subsist between them.

If the same general burdens were put upon all alike, whatever might be the subject matter of the taxation, the favored roads would continue to possess and enjoy the

privileges conferred in their charter, and not found in the charters of the others. Indirectly than, the legislation tends to withdraw the immunities secured by their charters, and constituting a contract between the state and themselves, or lessen their value, so that all may proximately, at least, stand upon the same footing, as if none such had been conferred.

We should be reluctant to hold, if there were no question of constitutional right involved, that this method of levying taxes was sanctioned by our own constitution, and consistent with the equality and uniformity which it contemplates.

The 'uniform rule' to be observed in the exercise of the taxing power seems to be so far applicable to the taxes imposed on 'trades, professions, franchises and incomes,' as to require that no discriminating tax be imposed upon persons pursuing the same vocation, while varying amounts may be assessed upon vocations or employments of different kinds.

'Although it is not expressly provided that the tax on trades, &c., shall be uniform,' in the words of Rodman, J., delivering the opinion in *Gatlin v. Tarboro*, 78 N. C., 119, 'yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the constitution above cited (Art., 5, Sec. 3), that it may be admitted that the collection of such a tax would be restrained as unconstitutional.' This uniformity prescribed in the constitution of Illinois, as declared by Mr. Justice Miller, extends 'to the class upon which the law shall operate; that is, inn-keepers may be taxed by one, ferries by another, railroads by another (rule); provided, that the rule as to inn-keepers be uniform as to all inn-keepers; the rule as to ferries be uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies.' Railroad Tax Cases, 92 U. S., 575. The govern-

ing principle is not that the same specific tax shall be paid by each, as a form of capitation tax, but that, whether levied upon and measured by the amount of gross or net earnings or other standard, as upon real or personal estate, there shall be no discrimination made among the individuals of a class, based upon privileges and immunities secured to one under contract and not to another. The essential element in all systems of taxation is equality in imposing burdens upon the property of the tax-payers, so that each one, possessing the same species of property, shall pay the same proportionate tax as every other levied upon that property, and in this state such tax is rejuired to be ad valorem."

The discrimination in the basis fixed for determining the taxable income of plaintiff and that for determining such income of individuals is for the reasons above set forth violative of the Constitution of North Carolina and the Constitution of the United States. Complainant is denied the deductions accorded individuals by the statute.

It is claimed by appellees that the denial to railroads of the right to deduct interest on their indebtedness is justified by the fact mortgage bond interest is more properly a capital charge. If this position is correct as to railroads, and we contend that it is not, it is equally applicable to other corporations which are financed by mortgage bond issues, and yet it appears in the record in this case at page 86 that numerous corporations doing business in North Carolina are allowed to deduct interest on large bonded indebtedness in arriving at their taxable net income.

IV

THE SCHEME OF TAXATION BY WHICH THE STATE GOVERNMENT IS SUPPORTED BY TAXES OTHER THAN AD VALOREM

TAX ON PROPERTY VIOLATES THE CONSTITUTION OF NORTH CAROLINA.

The legislature has not levied a tax on property for state purposes as required by Section 3, Article 5, of the Constitution of North Carolina.

Under numerous decisions of the Supreme Court of North Carolina, the provisions of this section that "laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money" are mandatory and if the legislature levies any taxes for state purposes, it *must* levy an ad valorem tax.

Section 3 of the Revenue Act (Public Laws, 1921, Chap. 34) provides that no tax on any property in the state shall be levied for any of the purposes of the state government, and for the first time in the history of the State an attempt has been made to support the state government by the levy of income, franchise, inheritance and similar taxes. This is a radical departure from the tax system which has been in use in this State since the adoption of the Constitution, and violates the letter and the spirit of that instrument.

> "It is the provision and was the purpose of the constitution that thereafter there should be no discrimination in taxation in favor of any class, person or interest, but that everything, real and personal, possessing value as property and the subject of ownership, shall be taxed equally and by uniform rule."
>
> Kyle v. Commissioners, 75 N. C., 445 (397).

In *Commissioners v. Tobacco Co.*, 116 N. C., at page 446, Chief Justice Clark, then Associate Justice, says:

> "As to corporations, by all authorities, it is in the power of the legislature to lay the following taxes, two or more of them in its discretion at the same time: 1. To tax the franchise (including in this the power to tax also

the corporate dividends). 2. The capital stock. 3. The real and personal property of the corporation. *This tax is imperative and not discretionary under the ad valorem feature of the constitution.* 4. The shares of stock in the hands of the stockholder. This is also imperative and not discretionary." (Italics added).

"The constitution, Art. 5, Sec. 3, commands that: Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money. It is apparent from an examination of the taxing laws of the State that the legislative department has attempted to observe and enforce *the mandate of the constitution.*" (Italics added).

Manning, J., in *Pullen v. Corporation Commission,* 152 N. C., at page 553.

"Whatever may have been the intention of the General Assembly in employing language so broad and comprehensive, we are forced to the conclusion that under the constitution of North Carolina all real and personal property owned and located within the borders of the State is subject to an ad valorem tax, and it is not to be supposed that the legislature intended to violate the fundamental law of the State, Art. V. Sec. 3, which requires in express terms that all real and personal property be taxed by a uniform rule according to its true value in money. In this respect the constitution 'shows no favor and allows no discretion.' *Wiley v. Commissioners,* 111 N. C., 397; *Puitt v. Commissioners,* 94 N. C., 709; *Vaughan v. Murfreesboro,* 96 N. C., 319. The imperative demand to levy the property tax upon the assessed value is in no way connected with the right to levy an inspection tax, or a tax on trades, professions, etc."

Guano Co. v. Biddle, 158 N. C., at page 214.

Section 3 Article V, is mandatory in requiring that taxa-

tion upon the property mentioned in it shall be ad valorem and that whatever tax is levied shall be uniform in its application.

R. R. v. Newbern, 147 N. C., 165.
Bickett v. Tax Commission, 177 N. C., 436.

In Smith v. Wilkins, 164 N. C., 140 Justice Allen says:

"In *State v. Worth*, 116, N. C., 1010, the court defines the term 'trades' as including any employment or business embarked in for gain or profit, and while the Constitution, Art. V, Sec. 3, is *mandatory* upon the General Assembly to levy a tax upon *all property by a uniform rule*, the authority to tax trades is permissive only, and no rule as to the method is prescribed."

In Lacy v. Packing Co., 134 N. C., page 573, it is said:

"The legislature is sole judge of what subjects it shall select for taxation (other than a property tax, which must be uniform and ad valorem) and the exercise of its discretion is not subject to approval of the judicial department of the State."

"By the Constitution, Art. V, Sec. 3, all the real and personal property in the state, is required to be taxed uniformly according to its value."

R. R. v. Commissioners, 72 N. C., 10.

Article VII, Sec. 9, provides that: "All taxes by any county, city, town or township shall be uniform and ad valorem upon all property in the same, except property exempted by this constitution." In construing this section in *Redmond v. Commissioners*, 106 N. C., 122, the Supreme Court held that it was not intended to apply the rules of uniformity to the subjects alone selected by the Legislature for the taxation in granting a municipal charter but requires that *all* property in the municipality shall be taxed, and taxed uniformly and equal. In the opinion of the Court, Justice Shepherd says:

"In the absence of constitutional limitations there is, it is

said, no restraint whatever upon the Legislature, and it may discriminate in favor of or against a particular class of persons or property, and pass laws in violation of every principle of just government, by an unequal distribution of the public burdens. The check upon such an abuse of power is in the influence of the constituents over their representatives; and the weight of authority is that the courts have no right to interfere with this exercise of the legislative will.

Thus it is seen that a wide field is open for a war between different classes of property, in that one class may be taxed to the exclusion or to the prejudice of another, and that under the forms of a free government, an excited partisan legislative majority may commit wrongs against the rights of property as flagrant and oppressive as those which have disgraced thereigns of themost despotic rulers.

But it is said that the General Assembly will be influenced by proper motives, and will levy taxes upon a just basis. Experience, in many of the states, has shown that the principles of taxation should not be left to the uncertainty of a caprice of successive legislatures, but that they should be fixed and immutable, and embodied in the fundamental law, under whose broad shield all property, of whatsoever species, may be equally protected.

This, we think, was the purpose of the framers of our Constitution in inserting therein the section referred to, as well as Section 3, Art. 5, relating to state taxation.

No one who reads these and other provisions of the Constitution will fail to be impressed with the earnest effort there made to engraft upon our organic law the great principle of equality in taxation."

It cannot be successfully contended that the levy of an ad valorem tax for county purposes complies with the requirements of Section 3 of Article 5 of the Constitution. Such tax is levied under Section 7 of Article 9, which relates to the levy

of taxes by counties, cities, towns and townships, and the requirement of uniformity applies only to the property within the borders of the county, city, etc. Certainly the county taxes are not uniform throughout the State, as required by Section 3 of Article 5.

In failing to levy a property tax for State purposes a greater proportion of the burden of taxation has been cast upon the complainant in that a proportionate part of the franchise tax of 1-10 of 1 per cent of the assessed value of its property, if this tax is valid as a franchise tax, and a proportionate part of the income tax were levied in lieu of the property tax demanded by the Constitution. The levy of a property tax for state purpose would have obviated in part, if not in whole, the necessity for an income tax.

V.

Jurisdiction to Enjoin Collection of the Income Tax.

A Court of equity has jurisdiction to enjoin the collection of a tax in a suit wherein it appears that the levy of the tax casts a cloud upon complainant's title and there is no adequate remedy at law.

Shaffer v. Carter, 252 U. S., 37.
Ohio River & W. R. Co. v. Dittey, 232 U. S., 576.

The remedy at law, in order to exclude equity, must be as practical and efficient as the remedy in equity and must be as prompt and certain.

Tyler v. Savage, 143 U. S., 79.
Wells Fargo & Co. v. Johnson, 214 Fed. 180, 189.

A statute providing for payment under protest and suit to recover back is not an adequate remedy at law.

In re Tyler, 149 U. S., 164, 189.
Southern Ry. Co. v. Asheville, 69 Fed., 360.
King v. Northern Pacific R. Co., 196 Fed., 323.

Special statutory remedy does not exclude right of equity to enjoin.

Taylor v. L. & N. R. Co., 88 Fed., 350.
Gregg v. Sanford, 65 Fed., 151.

Income tax goes into treasury of State and complainant has no right to sue the State for its recovery.

Pyle v. Brenneman, 122 Fed., 787.

The jurisdiction extends to the disposition of all questions raised by the bill.

Shaffer v. Carter, 252 U. S., 37.

We submit, in conclusion, that for the reasons set forth herein the Income Tax Act of 1921 is invalid and the collection of the tax by defendants should be enjoined.

Respectfully submitted,

MURRAY ALLEN,
Counsel for plaintiff.

JAMES F. WRIGHT,
FORNEY JOHNSTON,
Of Counsel.

APPENDIX A.

Assignments of Error.
Filed Nov. 27, 1922.
In the District Court of the United States for the Eastern District of North Carolina.
In Equity.
No. 447.
Seaboard Air Line Railway Company, Plaintiff,
against
A. D. Watts, Commissioner of Revenue of North Carolina, et als., Defendants.

Now comes the plaintiff in the above entitled cause and, in connection with its petition for appeal from the decree entered November 13th, 1922, denying the application for a permanent injunction, files the following assignments of error:

THE COURT ERRED:

1. In decreeing that, upon consideration of the bill and answer, exhibits and evidence, plaintiff is not entitled to have the defendants or either of them enjoined and restrained from the performances of the duties imposed upon them by the statutes of North Carolina relating to the administration, assessing, levying and enforcement or collection of the income tax against the plaintiff.

2. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because said act is in violation of the Constitution of North Carolina and the Constitution of the United States, creates a discrimination against plaintiff and other railroad companies or similar character in favor of other corporations and individuals in that the said act in order to ascertain the taxable income allows other corporations and

individuals certain deductions, many of which said deductions are not allowed to plaintiff and the other railroad corporations of similar character.

3. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because, under the provisions of the Income Tax Act of 1921, and particularly Section 202, Section 300, and Section 306, all corporations which are required to keep records according to standard classification of accounting of the Interstate Commerce Commission, are required to pay a tax on their net income, which is defined by Section 300 as "the gross income of a taxpayer, less the deductions allowed by this act," whereas plaintiff and other railroads and public service corporations which are required to keep records according to the standard classification of accounting of the Interstate Commerce Commission, are required to pay a tax on their net income, which is defined by Section 300 as "the gross income of a taxpayer, less the deductions allowed by this act," whereas plaintiff and other railroads and public service corporations which are required to keep records according to the standard classification of accounting of the Interstate Commerce Commission, are not allowed the deductions set forth in the said act, except "uncollectible revenue" and taxes paid in the State for the income year other than income taxes, war profits and excess profits taxes, and certain deductions for car hire, and plaintiff and other railroad companies and public service corporations of similar character referred to in Section 202 of the Income Tax Act of 1921 are denied large deductions which are granted other corporations individuals and railroads not included in the provisions of Section 202, and particularly the deduction of interest paid during the income year, which results in discrimination against the plaintiff, in violation of the Constitution of North Carolina,

and denies the plaintiff the equal protection of the law and deprives it of its property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

4. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because said act does not operate equally and uniformly upon all taxpayers in similar circumstances, and that the plaintiff and other railroads and public service corporations, which are required to keep records according to the standard classification of accounting of the Interstate Commerce Commission, have been arbitrarily selected and taxed upon a more burdensome basis and one that is different from that applied to corporations in general and to other corporations engaged in business similar to that of plaintiff, in violation of the Constitution of North Carolina and plaintiff is thereby denied the equal protection of the law and is deprived of its property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

5. In failing to hold that the plaintiff is entitled to an injunction as prayed for in the bill of complaint, for that the income taxattempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because said tax is not levied by a uniform rule as required by the Constitution of North Carolina, Article 5, Section 3, and the lack of uniformity works greatly to the detriment of plaintiff, in violation of said Article 5, Section 3, of the Constitution of North Carolina, and denies the plaintiff the equal protection of the law and deprives it of its property without the process of law, incontravention of the Fourteenth Amendment of the Constitution of the United States.

6. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because the classification of taxpayers for the purpose of fixing the income on which the tax shall be paid as made by the said Income Tax Act of 1921 is not based upon any reasonable round, but is a mere arbitrary selection so far as as plaintiff and railroad companies of similar character are concerned, and was made for the purpose and has the result of imposing upon such railroad companies and corporations, including plaintiff, an unjust burden of taxation, in violation of the Constitution of North Carolina and denies the plaintiff the equal protection of the law and deprives it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

7. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because the method of fixing plaintiff's taxable income as provided by Section 202 of the said Income Tax Act of 1921 violates the Constitution of North Carolina and the Constitution of the United States because it does not apply to railroads and public service corporations which derive their income from sources other than the operation of their property, which results in a lack of uniformity in the application of the income tax and in discrimination against plaintiff, and therein denies the plaintiff the equal protection of the law and deprives it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

8. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the In-

come Tax Act of 1921 enacted by the Legislature of North Carolina is void, because the authority of the Legislature of North Carolina to tax incomes is derived from Section 3, Article 5, of the Constitution of North Carolina, and said section provides that only net incomes may be taxed, and in attempting to tax the "operating revenues" of plaintiff, the said act violates the Constitution of North Carolina and denies the plaintiff the equal protection of the law and deprives it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

9. In failing to to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because said act is violative of Article 5, Section 3, of the Constitution of North Carolina, for that it does not levy upon railroads and other public service corporations named in said Section 202, a tax on net income, but levies a tax upon the operating revenue derived from interstate and intrastate commerce, and does not permit the deductions necessary and incidental to the business of plaintiff and expended by it from said income in order to determine net income, and is in violation of the Interstate Commerce Clause, (Section 8, Article 1) of the Constitution of the United States, in that it permits a tax as an income tax to be placed upon gross income derived from interstate commerce, thereby burdening interstate commerce.

10. In failing to hold that the plaintiff is entiteled to the injunction as prayed for in bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is voaid because said act violates the Transportation Act of Congress and the Interstate Commerce Act, in that it seeks to prescribe a method of accounting by this inter-

state carrier, when said Acts of Congress have delegated the power to prescribe said accounting to the Interstate Commerce Commission and the said Commission has prescribed and directed that this plaintiff and other interstate carriers keep their accounts in accordance with the methods so prescribed by it.

11. Infailing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because the State of North Carolina, by its tax laws, permits the counties, cities, towns, townships and special taxing districts to levy taxes on the assessed value of plaintiff's property known as an ad valorem tax, which is based upon the whole property of plaintiff, tangible, and to this tax law of the State add a so-called franchise tax of one-tenth of one per cent on the same assessed value, and by the statutes hereinbefore referred to, the Legislature of North Carolina has levied and unless restrained the defendants in this action will undertake to collect an additional tax characterized as an income tax of three per cent on plaintiff's net operating revenue, including revenue derived from interstate commerce, and plaintiff avers that this system of pyramiding taxes and the entire scheme of taxation amounts to a regulation of commerce between the States, because necessarily a tax of one-tenth of one per cent upon the tangible and intangible property of this plaintiff and a tax of three per cent upon its net operating revenue, including revenue derived from interstate commerce, are taxes upon interstate commerce, the property, tangible and intangible, having already been taxed at its full value and plaintiff shows that this scheme of taxation levies a tax and burden upon the interstate commerce of plaintiff and violates the Commerce Clause of the Constitution of the United States, Section 8 of Article 1.

12. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the

income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void because the penalties im posed for failure to comply with the Income Tax Act enacted by the Legislature of North Carolina are so excessive as to be violative of plaintiff's rights under the Constitution of the United States.

13. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is viod because the plaintiff has no adequate remedy at law.

14. In failing to hold that the plaintiff is entitled to the injunction as prayed for in the bill of complaint, for that the income tax attempted to be imposed upon plaintiff by the Income Tax Act of 1921 enacted by the Legislature of North Carolina is void for that the levying of the income tax casts a cloud upon plaintiff's title.

MURRAY ALLEN,
Solicitor for Plaintiff.